Supreme Court, U.S.
FILED
JUN 13 1994
OFFICE OF THE CLERK

(3)

No. 93-1771

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1993

JOHN CASILLAN,
DAVID L. SMITH,

Petitioners,

vs.

REGIONAL TRANSPORTATION DISTRICT, AMALGAMATED TRANSIT UNION, DIVISION 1001, MICHAEL GARCIA, RICHARD BAUMAN, ROBERT GARSIDE, ED RHATICAN, PETER PEREA, BERNIE SNYDER, GEORGE STANKO, and GREGG FISHER,

Respondents.

(PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT)

BRIEF OF RESPONDENT AMALGAMATED TRANSIT UNION, DIVISION 1001 IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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21 pp

QUESTIONS PRESENTED FOR REVIEW

1. Whether the Petition should be dismissed because filed by an attorney suspended from practice before the Tenth Circuit.

2. If not, whether Petitioners' "factless" Complaint was properly dismissed for failure to state a claim;

3. Whether sanctions were imposed upon Petitioners in conformity with applicable law; and

4. Whether the failure of the District and Circuit Courts to recuse themselves because of Petitioners' dissatisfaction with their rulings was a violation of 28 U.S.C. § 455(a).

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STATEMENT OF THE CASE

Petitioners herein, plaintiff, John Casillan, and his attorney below, David Smith, request that this court exercise "supervision" of the U.S. District Court for the District of Colorado and of the Tenth Circuit Court of Appeals. Their request is based solely on their dissatisfaction with the rulings in the case below.

This case arose out of the termination of Mr. Casillan by his employer, the Regional Transportation District ("RTD"). Mr. Casillan was a member of a duly-recognized collective bargaining unit represented by this Respondent, the Amalgamated Transit Union, Division 1001 (the "Union").

Mr. Casillan grieved his termination, and in due course, the Union took his grievance to arbitration. The Union won Mr. Casillan's reinstatement. However, the arbitrator ruled that while Mr. Casillan's termination was improper, the evidence presented demonstrated that RTD had reason for legitimate concern. Accordingly, the arbitrator made Mr. Casillan's reinstatement conditional upon his submission to a psychological evaluation which, he believed, would assauge

the District's concerns and limit its potential liability.

Mr. Casillan did not take the examination and, instead, filed a complaint against his employer, certain managerial employees of his employer, and his union, which complaint led to this appeal. Of his many alleged causes of action, only those concerning asserting conspiracy among the Respondents are implicated in this appeal. The balance of the issues raised herein concern sanctions imposed upon the Petitioners.

This Respondent did not participate in any of the proceedings concerning sanctions imposed for filing a motion for reconsideration of Magistrate Schauer's rulings, and accordingly, does not comment on the whether imposition or affirmation of the sanctions constitutes grounds for certiorari.

The balance of the sanctions appealed from were ordered by the Tenth Circuit to be imposed solely upon Petitioner David Smith for his baseless appeal of the dismissal of a "fact-less" complaint based upon frivolous legal arguments. In the course of discussing the lack of legal merit adduced in the appeal to the Circuit, the court also addressed the numerous abuses of pro-

cess the defendants had endured in proceedings below.

SUMMARY OF THE ARGUMENT

In the Petition, attorney David Smith admits that he has been suspended from practice by the Tenth Circuit. Under S.Ct.R. 8.1, he is disqualified from filing a petition with this Court on behalf of a client, and this Petition should be dismissed on that basis.

Even if this Petition were considered for review, the Petitioners assert no basis for a grant of certiorari under S.Ct.R. 10.1. The Petition consists of nothing more than conclusory allegations and extensive, foot-noted case citations. The cases cited are all either inapposite or easily distinguishable from the case at bar.

To put it succinctly, Petitioners were not entitled to discovery before the District Court ruled on the Respondents' motions to dismiss, and Mr. Smith's appeal to the Tenth Circuit on this basis was frivolous. Accordingly, the Circuit's imposition of sanctions against attorney Smith was well within its discretion.

Mr. Smith asserts a plethora of procedural and equitable arguments for the proposition that there was something improper about the way the

sanctions were imposed. Not one of these arguments has any merit whatsoever. There was no departure, or sanction of a departure, from the accepted and usual course of judicial proceedings. Much less do any of the alleged irregularities rise to a level of import which warrants this Court's attention.

ARGUMENT

I. BECAUSE ATTORNEY DAVID SMITH HAS BEEN SUSPENDED BY THE TENTH CIRCUIT, HE SHOULD ALSO BE SUMMARILY SUSPENDED FROM PRACTICE BEFORE THIS COURT, AND THE PETITION SHOULD BE STRICKEN.

Supreme Court Rule 9.1 provides that an attorney seeking to file a pleading, motion or other paper with the Court must first be admitted to practice therein. However, Supreme Court Rule 8.1 states, in pertinent part:

> Whenever it is shown to the Court that a member of the Bar of this Court has been disbarred or suspended from practice in any court of record, or has engaged in conduct unbecoming a member of the Bar of this court, that member will be suspended from practice before this Court forthwith . . . .

(Emphasis supplied.)

Attorney Smith admits, and complains extensively about, the fact that he has been suspended from practice before the Tenth Circuit Court

of Appeals. (See four-page footnote, Petition, pp. 14-17.) The Rule is unambiguous. David Smith should be suspended forthwith and, having no right to file representational pleadings with this Court, the Petition should be dismissed.

II. PETITIONERS HAVE MISCHARACTERIZED THE FACTS.

Petitioners' characterization of the "facts" is disputed by the Respondent Union in several respects. It consists of no more than the mere opinion of Petitioners and is wholly unsupported by any findings of record. It has, for example, never been established whether the accusation that Mr. Casillan attempted to run down a co-employee with a golf cart was false. The statements that the Union failed or refused to adequately represent Mr. Casillan and that the arbitrator "issued a decision rubber-stamping the unconstitutional actions by the RTD and its officials" are scandalous, impertinent, and also unsupported by any findings of record.

These factual inaccuracies are cited in deference to S.Ct.R. 15.1 only because, taken with other inaccurate allegations, Petitioners would have it appear to the Court that Petitioner Casillan was subjected to a series of highly irregular proceedings. That is not true. The

more important misstatements, however, concern certain rulings made by the district and appellate courts, and are discussed below in the order in which they appeared in the Petition.

III. NONE OF PETITIONERS' CONCLUSORILY STATED GROUNDS FOR CERTIORARI MEET THE STANDARDS OF S.CT.R. 10.1. IN EACH CASE, THE RULINGS COMPLAINED OF WERE WELL-GROUNDED IN THE LAW AND CONSISTENT WITH THE USUAL COURSE OF JUDICIAL PROCEEDINGS.

In their Statement of the Case, Petitioners complain that U.S. District Court Judge Daniel B. Sparr ruled on the motions to dismiss and/or for summary judgment filed by all the defendants below (Respondents herein) without permitting the Petitioners further discovery. They complain that the U.S. Court of Appeals for the Tenth Circuit failed to rule on the merits of their conspiracy theory. They also complain that the courts imposed monetary sanctions for filing a frivolous appeal upon the attorney, David Smith, without notice or an opportunity to be heard. They further complain that the Tenth Circuit upheld the District Court's findings, on remand, concerning the proper amount of attorney fees to be assessed, without addressing Petitioners' arguments in opposition to the Tenth Circuit's sanction and without heeding attorney

Smith's claims of impecuniosity. (In a footnote, they also complain that the District Court refused to sanction the Respondents for also filing claims for attorney fees for proceedings in the District Court, a matter clearly within the court's discretion.)

Interestingly, the Argument consists solely of the statement that Mr. Casillan was "illegally" deprived of an opportunity for discovery, followed by a recitation of the various sanctions imposed against the Petitioners during the proceedings below. Rather than argument, this section contains only conclusory allegations that the sanctions were imposed in contravention of the holdings in various cases, supported solely by extensive, footnoted quotes from those cited cases.

As in proceedings below, no facts are stated upon which a court might base a decision on the merits. There is no reference to the record and no explanation of how the cited cases should be applied to the facts in this case. Having not made clear the basis upon which certiorari should be granted, the Petition does not conform to the requirements of Supreme Court Rule 14(k).5.

Despite these inadequacies, the gist of the Petitioners' arguments may be garnered from the juxtaposition of conclusory allegations and case citations provided. However, these "arguments" consist of nothing more than mere disagreement with the well-grounded holdings of the Tenth Circuit that the case law upon which Petitioners relied is miscited or does not apply under the facts of this case.

The Petitioners' conclusory statements are addressed *in seriatim*. None of them state a basis under which certiorari might be granted under S.Ct.R. 10.1.

A. Petitioners Were Not Entitled to Discovery before a Ruling on a Motion to Dismiss. The Cases Cited Are Inapposite.

Regarding the claim that the District Court dismissed the complaint without benefit of complete discovery, the Petitioners fail to acknowledge that the Complaint was dismissed for failure to state a claim, and not as the result of a grant of summary judgment under F.R.C.P. 56. (See Appendix 29a.) Accordingly, Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 106 S.Ct. 2505, 91 L.Ed.2d 202 (1986) is completely inapposite.

As noted by the Tenth Circuit, the complaint in this case remained "fact-less" (Appendix 29a) even after being twice amended (Appendix 24a.). The Court explained to Petitioners that its holding in Lessman v. McCormick, 591 F.2d 605 (10th Cir. 1979), was based on a complaint which contained "specific facts", "as distinguished from conclusory allegations", citing its holding in Swanson v. Bixler, 750 F.2d 810 (10th Cir. 1984). (Appendix 16a-18a, emphasis in the original.) In this case, Petitioners utterly failed to meet the minimum standards for a sufficient complaint which could survive a motion for dismissal, much less entitle plaintiff to discovery, as in Lessman.

Upholding the dismissal of the complaint under these circumstances was wholly supported by the law and was consistent with the usual and accepted course of judicial proceedings. It was not in conflict with the decisions rendered by this Court or by any other court cited by Petitioners or known to Respondent Union. It therefore presents no basis, under S.Ct.R. 10.1 or otherwise, upon which to grant certiorari.

B. The Conspiracy Claim Was Addressed and Properly Dismissed.

Petitioners' claims that the Tenth Circuit failed to address the merits of their conspiracy

claim, and the dismissal thereof over their objections, is contrary to fact. The Tenth Circuit clearly held that they failed to state a conspiracy claim (Appendix 21a), and dismissed the complaint on that basis, among others (Appendix 25a-29a). Petitioners' citations to Cooter & Gell v. Hartmarx Corp., 496 U.S. 384, 110 S.Ct. 2447, 110 L.Ed.2d 359 (1990) are unavailing. They have not stated in what respect the dismissal of the conspiracy claim was 'based on a clearly erroneous view of the law'.

As noted above, the dismissal of the complaint, including the conspiracy claims therein, where no facts were pleaded, was wholly supported by the law, was consistent with the usual and accepted course of judicial proceedings, and was not in conflict with the decisions of any court. Upholding the dismissal of the conspiracy claim therefore presents no separate basis upon which this Court might grant certiorari.

C. Far from Being Denied Due Process, Petitioners Failed to Exercise Their Rights to Respond to Requests for Sanctions.

In claiming they were denied due process when the Tenth Circuit imposed sanctions for their frivolous appeal, Petitioners fail to mention that Respondents' requests for attorney

fees were properly raised in their responsive briefs and that Petitioners failed to file a reply brief, as permitted under Tenth Circuit Rule 31.2.1 then in effect. Thus, contrary to the "argument" at pp. 18-19 of Petitioners' brief, in fact, Mr. Smith had notice of the request for attorney fees and failed to respond.

This is dispositive of any and all claims that Petitioners were denied due process in the award of attorney fees. They simply failed to utilize the process which was available. The proposition that the District Court had jurisdiction to review the propriety of the Tenth Circuit's imposition of sanctions is too ludicrous to warrant discussion. The rulings of both the Tenth Circuit and the District Court in this regard are wholly consistent with the normal course of judicial proceedings and form no basis for a grant of certiorari.

D. All of the Bases Asserted by Petitioners for Review of the Sanctions Imposed Against Attorney David Smith Are Consistent with Applicable Law.

Citation to White v. General Motors Corp., Inc., 908 F.2d 675 (10th Cir. 1990) does nothing to bolster Petitioners' claim that they presented colorable claims below. The only claims "argued" to this Court are those concerning the

right to discovery under an insufficient complaint and asserting that the conspiracy claim was not considered and was improperly dismissed. Those issues are discussed above. Petitioner has presented no argument and stated no facts to support a claim that their actions in this regard were objectively reasonable. By contrast, the Tenth Circuit was quite explicit in describing the conduct which it believed was unreasonable and warranted sanction. Accordingly, there is no basis for a grant of certiorari on the grounds that a decision was rendered contrary to the holding in White, *id.*

The conclusory, unsupported claim that Mr. Smith's conduct manifested no intentional or reckless disregard of his duty to the courts suffers a similar infirmity. There has been no showing that any holding in Braley v. Campbell, 832 F.2d 1504 (10th Cir. 1987) has been disregarded, but the Tenth Circuit clearly stated its reasons for holding that Mr. Smith's transgressions were the result of more than mere inadvertence (Appendix 30a-37a).

Petitioners also complain that monetary sanctions were imposed upon counsel in excess of the minimum needed to deter future transgressions, in contravention of holdings in White,

supra, and in excess of Mr. Smith's ability to pay. However, Petitioners do not cite that portion of the White decision which notes that the sanctioned parties must "come forward with evidence of their financial status" in order for the court to consider whether the contemplated amount of the sanction is excessive. *Id.*, 908 F.2d at 685. Thus, if the sanction imposed was more than the necessary minimum, the burden was on Petitioner's counsel to demonstrate that fact to the District Court. Petitioners do not allege that counsel presented such evidence, and in fact, he did not. Accordingly, the imposition of sanctions was consistent with White and forms no basis for a grant of certiorari.

The complaint that the sanctions imposed would have a "chilling" effect on civil rights litigation is, as are all other claims, unsupported by any evidence, any finding, or any ruling. The "supporting" citation from White, while it mentions the "chilling" effect, wholly supports the Tenth Circuit's determination that the sanction of attorney fees was appropriate in this case based on its unequivocal findings concerning the severity of the violations and the bad faith with which they were committed. (Appendix 36a-39a.)

Furthermore, the award of sanctions leaves no doubt whatever, as between Mr. Casillan and his attorney, Mr. Smith, as to who is at fault. (Appendix 38a-39a.) The claim that it failed to do so is frivolous. The fault was apportioned to and the sanctions imposed upon Mr. Smith.

Mr. Smith's objections to his suspension by the Tenth Circuit is not properly before this Court in this appeal, as it did not arise out of the decision appealed from. Accordingly, they are not discussed here by Respondent Union except to note, as above, that Mr. Smith lacks standing to file a representational appeal in this case.

IV. NO SUPPORTABLE BASIS IS STATED FOR A VIOLATION OF 28 U.S.C. § 455(a). THE CLAIM IS BASED SOLELY UPON THE PETITIONERS' DISSATISFACTION WITH THE RULINGS IN THE CASE.

Finally, relying upon all of the contentions discussed and disposed of above. Petitioners claim a violation of 28 U.S.C. § 455(a). In Liteky v. U.S., No. 92-6921, ___ U.S. ____, 62 USLW 4161 (1994), this court was in complete agreement that "judicial rulings alone almost never constitute a valid basis for a bias or partiality motion", citing U.S. v. Grinnell, 384 U.S. 563, 583 (1966). (The dissent cites Berger

v. U.S., 255 U.S. 22, 31 (1921), for the proposition that the extrajudicial doctrine discussed in Grinnell is limited to claims of bias which, as here, are based solely upon judicial rulings.)

Here, the discontented litigant seeks review of the failure of the courts below to recuse themselves based on nothing more than their dissatisfaction with the rulings in the case. No other basis, extrajudicial or otherwise, is stated for the proposition that the courts' impartiality might reasonably be questioned. Under this Court's recent and long-standing interpretations of 28 U.S.C. § 455(a), no violation could possibly be found under the facts suggested here, and accordingly, there is no basis in this claim for a grant of certiorari.

CONCLUSION

Petitioners' request for review of the rulings of the Tenth Circuit on writ of certiorari should be summarily denied.

Respectfully submitted,

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